No. 87-1379

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1988

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UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
*Petitioners,*

v.

REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS, *et al.*

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**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

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## BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether, in applying Exemptions 6 and 7(C) of the Freedom of Information Act, a court must weigh the public interest in disclosure of the information sought in light of the particular purpose for which the requester seeks to utilize the information.

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## BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES IN SUPPORT OF RESPONDENTS

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The National Association of Retired Federal Employees ("NARFE") submits this brief *amicus curiae* to urge that the Court affirm the decision below but reject the analysis employed by that court in ascertaining the extent to which the public interest was furthered by the release of the documents requested.

### INTEREST OF NARFE

NARFE is a nonprofit, incorporated association having its principal place of business in Washington, D.C. From its original fourteen charter members, NARFE has grown to a membership now exceeding half a million federal

annuitants (retirees and survivors) living throughout the 50 states, Puerto Rico, the Canal Zone, the Republic of the Philippines, and various foreign countries. NARFE has been a major advocate in maintaining the integrity of the federal government's civilian retirement systems and has been directly involved, through lobbying and related activities, in all legislative and executive changes in these systems over the past six decades.

NARFE has concerned itself with issues affecting the aged and aging, and in particular those issues which affect federal annuitants. NARFE's goal is to identify issues of particular importance to federal annuitants, to inform its members, through its Newsletter and the state and local chapter network, of these issues, and to act upon these issues to further the members' common goals. NARFE also assists federal annuitants in obtaining benefits to which they may be entitled under the retirement laws and by interacting with various federal agencies and private entities on such matters as federal annuities and health and life insurance benefits.

The Office of Personnel Management currently has pending in the District of Columbia Circuit its appeal of NARFE's successful Freedom of Information Act suit compelling the release of the names and addresses of recent additions to the federal retirement rolls. *See National Association of Retired Federal Employees* v. *Horner*, 633 F. Supp. 1241 (D.D.C. 1986). That court has stayed further proceedings pending resolution of *Reporters Committee*. Accordingly, as this Court's decision may have broad and perhaps unanticipated effects on a range of FOIA issues, NARFE has obtained the consent of the parties to participate in this matter as *amicus curiae*.[1]

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[1] Counsel for the petitioners and respondents have consented to the filing of this brief. Their letters have been filed with the Clerk pursuant to Rule 36.2 of the Rules of this Court.



## ARGUMENT

NARFE supports the judgment below and submits that the decision, requiring release of requested "rap sheets," should be affirmed. NARFE's concern here, however, is that the analysis employed by the court of appeals, and in particular its assessment of the "public interest" in release of the requested documents, is faulty. We submit that the "public interest" side of the balancing employed in Exemptions 6 and 7(C) [2] is not static, but, like the privacy component of the calculus, varies with each particular request. Moreover, NARFE submits that the assessment of the public interest in release of any particular information cannot be made solely upon examination of the information sought, but must instead include consideration of the identity of the requester and the intended purpose to which the information is to be applied. Thus, we reject the government's proffered "core purpose" test as the measure of the public interest as it is both unworkable, and, more significantly, at odds with Congress' intent.

### A. The Court of Appeals' Public Interest Analysis Is Flawed

The court of appeals recognized that Exemptions 6 and 7(C) call for a balancing of the public interest in dis-

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[2] 5 U.S.C. § 552(b)(6) and (7)(C). As both Exemptions 6 and 7(C) hinge release of requested documents on the putative presence of an "unwarranted invasion of personal privacy," they have been used interchangeably throughout these proceedings. There are two significant textual differences between these provisions, however, which demonstrate that Congress did not intend their application to be coextensive: Exemption 6 requires the government to show that release of the information *would* create a *clearly unwarranted* invasion of privacy while Exemption 7(C) merely requires a showing that the release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Thus, the government not only has a heightened burden of proof under Exemption 6, but the substantive standard differs as well.

closure against the individual privacy interests at stake. Yet the court refused to assess the degree of public interest in disclosure of the requested information, concluding instead that "the phrase 'public interest' as used in Exemptions 6 and 7(C) of the Act means [nothing] more or less than the general disclosure policies of the Act." *Reporters Committee for Freedom of the Press* v. *Department of Justice*, 831 F.2d 1124, 1126 (D.C. Cir. 1987). Thus the court held that the public interest side of the balance is static; no matter who the requester may be or what information is sought, the public interest side of the equation is no more than the broad policy of the Act favoring disclosure. This truncated analysis is incorrect.

For the past twenty years courts have recognized that the public interest component of Exemption 6 required an *ad hoc* assessment of the circumstances of the particular case. While the general policy of disclosure that underlies the statute has been taken as a given in each case, it has not been assumed, as the court below believes, that this obviated the need for a particularized public interest analysis. *See, e.g., Getman* v. *NLRB*, 450 F.2d 670 (D.C. Cir. 1971); *Disabled Officer's Ass'n* v. *Rumsfeld*, 428 F. Supp. 454 (D.D.C. 1977), *aff'd sub nom. Disabled Officer's Ass'n* v. *Brown*, 574 F.2d 636 (1978). This approach is anchored firmly in the expressions of intent that attended Congress' enactment of the statute:

> The phrase "clearly unwarranted invasion of privacy" enunciates a policy that will involve a balancing of interests between the protections of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information.

S. Rep. No. 813, 89th Cong., 1st Sess. at 9 (1965). As this Court observed in *Department of Air Force* v. *Rose*, 425 U.S. 352, 373 (1976), Congress intended that a particularized balancing of the "private and public interests" be undertaken in each case. *See also id.*, at n.9, ("[i]t is not an easy task to balance the opposing interests, but it is not an impossible one either" *quoting* S. Rep. No. 813 at 3.) Thus, no matter how "awkward" the court may have found assessing the public interest in disclosure, *Reporters Committee*, 816 F.2d at 740, "the federal courts are duty-bound, for better or worse, to perform the task Congress has assigned [them]." *Id.*, at 746 (Starr, J., dissenting).



To be sure, the court of appeals acknowledged that it was required to undertake a balancing of the privacy and public interests at stake, but it felt helpless to individualize the public interest because Congress had not provided it standards by which to make this assessment. Yet courts routinely determine the "public interest" in a broad range of activities, including both the FOIA itself (search and duplication costs waived if in the public interest, 5 U.S.C. § 552(a)(4)(A)(iii); attorney fees available if there is public benefit, 5 U.S.C. § 552(a)(4)(E)), and unrelated areas of law. *See, e.g., Murray* v. *United States*, 108 S.Ct. 2529 (1988) (balancing the public interest in deterring unlawful police conduct and having juries receive all probative evidence); *Stewart Organization, Inc.* v. *Ricoh Corp.*, 108 S.Ct. 2239 (1988) (considering the "public-intrest factors of systemic integrity and fairness" in the context of change of venue); *FDIC* v. *Mallen*, 108 S.Ct. 1780, 1788 (1988) (weighing the public interest in maintaining public confidence in banks against the right to prompt post-deprivation hearing). *See also Virginia Petroleum Jobbers Ass'n* v. *Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (making public interest a criterion for granting a preliminary injunction). The absence of statutory guidance in these matters has not created insurmountable obstacles for the courts in these and a whole range of other cases, and it should not have done so here.

The court of appeals' difficulty in assessing the public interest in disclosure was caused, in large measure, by

its mistaken assumption that it had to make this assessment without taking account of the identity of the requester and its purpose in seeking the information. Thus, believing that "Congress granted the scholar and the scoundrel equal rights of access to agency records," *Durns* v. *Bureau of Prisons*, 804 F.2d 701, 706 (D.C. Cir. 1986), the court of appeals limited itself to gleaning the public interest from whatever reflections of that interest inhered in the information itself.

Such a myopic approach, however, disables the court from making the very assessment that Congress has mandated. Raw data, absent consideration of how it will be processed, is valueless. The worth of the information—and its value to the public—necessarily turns on how it will be used. The value of the information, *i.e.*, its public interest, is inchoate until its intended use is credibly articulated. Congress could not have intended, as the court of appeals implicitly held, that a requester who intended to use the retrieved documents for kindling would enjoy the same stature as one who intended to "ascertain for itself whether government action is proper." *Washington Post Co.* v. *Department of Health and Human Services*, 690 F.2d 252, 264 (D.C. Cir. 1982). With the exception of the court below, which eschewed consideration of the public interest, no court has ever decided an Exemption 6 or 7(C) case without at least tacitly considering how the information would be used. *See, e.g.*, *Department of Air Force* v. *Rose*, 425 U.S. 352 (concern exclusively with the use intended by the requesters). *See also* Note, "The FOIA—The Parameters of the Exceptions," 62 Geo. L. J. 177, 197-98 (1973) (Exemption 6 is "an exception to the generalized rule that no inquiry should be made into the particular need of the person requesting the information").

To be sure, this Court has held that the FOIA must generally be applied neutral to the identity of the requester and its purpose. Thus, in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975), this Court held that "the Act clearly intended to give any member of the public as much right to disclosure as one with a special interest therein." Similarly, in *FBI* v. *Abramson*, 456 U.S. 615, 631 (1982), the Court held "Congress did not differentiate between the purposes for which information was requested." As a general rule, there can be no quarrel with this. But as the Court recently recognized in *Department of Justice* v. *Julian*, 108 S.Ct. 1606, 1612 (1988) (an Exemption 5 case), this is only a general rule:



> The fact that no one need show a particular need for information in order to qualify for disclosure under the FOIA does not mean that in no situation whatever will there be valid reason for treating a claim of privilege under Exemption 5 differently as to one class of those who make requests than as to another class.

Similarly, this general rule is inapplicable in the context of Exemptions 6 and 7(C). It is axiomatic that in interpreting statutes the specific must take precedence over the general. *Busic* v. *United States*, 446 U.S. 398 (1980). It is equally self-evident that acts of Congress should not be construed in a way that would impute to Congress an intent to do a useless thing. *Carnegie-Mellon University* v. *Cohill*, 108 S.Ct. 614, 624 (1988). Yet by equating the public interest of components Exemptions 6 and 7(C) with nothing more than the general policy favoring disclosure, the court below has wholly denuded these exemptions of meaning. Congress has required a particularized assessment of competing interests based on the circumstances extant at a specific time and place. It would not have done so had it intended that those balancing the interests would merely recite that the public has a general interest in disclosure.

That the court of appeals misconstrued Congress' general mandate of identity- and purpose-neutrality as pre-

cluding it from considering these factors in its public interest analysis is also evident from legislative history of proposed (and partially adopted) amendments to Exemptions 6 and 7(C). Specifically, during the 98th and 99th Congresses, bills were introduced seeking to amend the FOIA. After "the most exhaustive examination of the Freedom of Information Act in its history," S. 774 was introduced and referred to the Senate Judiciary Committee. *See* S. Rep. No. 221, 98th Cong., 1st Sess. at 1 (1983). This bill sought to amend Exemption 6 specifically to exempt from disclosure

> records of information concerning individuals, including compilations or lists of names and addresses that could be used for solicitation purposes, the release of which could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy.

S. Rep. No. 221, *supra* at 45.[3]

In its consideration of the amendment to Exemption 6, Congress explicitly endorsed evaluation of the public interest with reference to the intended use of the requests. Specifically, the Judiciary Committee explained the intent of this amendment as follows:

> Finally, the amendment makes it clear that lists of names and addresses which "could be used for solicitation purposes" are subject to the exemption, if disclosure could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy. By requiring the courts to balance the interest in disclosure of such lists against the interest in privacy, the Committee recognizes that disclosure may be appropriate in some circumstances. *See Disabled Officers Association* v. *Rumsfeld*, 428 F. Supp. 454 (D.D.C. 1977) (list of disabled retired military personnel disclosed to nonprofit organization established to assist members in pursuing benefits and advocating their interests nationally).

[3] This amendment was not enacted, and neither was an identical bill presented in the 99th Congress. *See* S. 150, "The Freedom of Information Reform Act," 99th Cong., 1st Sess. (1985). In 1986, however, the amendments to Exemption 7(C) originally proposed in this legislation were finally adopted. *See* Freedom of Information Reform Act of 1986, Pub. L. No. 99-570 (1986).



S. Rep. No. 221, *supra* at 22. Congress was not only aware that the judicial construction of Exemption 6 calls for the particularized inquiry into the intended use of the information, and thus acquiescent in it by virtue of its silence, *Cannon* v. *University of Chicago*, 441 U.S. 677, 696 (1979), but moreover it explicitly endorsed this approach in consideration of an amendment intended to *limit* the scope of Exemption 6. The court of appeal's decision is not consonant with this legislative history and, for this reason as well, must be rejected.

For these reasons, it is both illogical and at odds with Congress' intent to analyze Exemption 6 and 7(C) claims as the court below has done. It is a given that Congress was animated by a general favoring of disclosure when it enacted the FOIA. And, self-evidently, having acted on that basis, it can be assumed that this general policy is a reflection of the public interest. At the same time, however, Congress plainly contemplated that in those cases where genuine privacy interests were implicated, a more particularized assessment of the public interest would have to be made. While the general interest the public has in disclosure may be static, its impact is to require a "balance tilted emphatically in favor of disclosure" from the outset. *Bast* v. *Department of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981). Beyond this, however, it remains that Congress called for a discrete balancing that takes account of the specific public and privacy interests at stake. The court below rejects this, and in so doing undermines Congress' purpose.

### B. The Government's "Core Purpose" Test is Unworkable

Before the decision in *Reporters Committee*, determination of the public interest in disclosure was a straightforward matter. Courts looked to the uses to which the

requested information was intended to be put and determined how the public was benefited by this use of the requested information. *See, e.g., Getman* v. *NLRB*, 450 F.2d 670 (D.C. Cir. 1971); *Minnis* v. *Department of Agriculture*, 737 F.2d 784 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985); *Wine Hobby USA, Inc.* v. *Internal Revenue Service*, 502 F.2d 133 (3d Cir. 1974); *Disabled Officer's*, 428 F. Supp. 454 (1972). Thus, in *Disabled Officer's*, the court identified the public interest by analyzing the services the requester provided in light of the manner in which it intended to utilize the information:

> Many of [the Association's] services benefit not only the Association's members, but also military personnel and the public in general. For instance, by lobbying and testifying on proposed and pending legislation, the Association provides information to Congress and helps to insure that Congress is apprised of the interests and needs of a significant segment of the public which its actions will affect.

*Id.*, at 458. To be sure, it has not always been easy to identify a consistent thread running through all these decisions, but in each case an analysis of the intended use of the information *by the requester* and a determination of how the public was benefited thereby was undertaken.

The government argues that the court below was half right—it was wrong in eschewing a particularized assessment of the public interest, but it was right in holding that the intended use of the information was irrelevant. The government proposes that, instead of analysis of how the public will be benefited by the disclosure, the public interest must be gauged by how nearly the information serves the "core purpose" of the Act. The government's "core purpose" test, however, is fundamentally flawed.

Perhaps the single greatest problem with the government's "core purpose" test is that there can be found no mention of such a test anywhere in the statutory language or its reported history. Congress provided nine specific exceptions to the broad mandate for disclosure of government records, and directed that these exemptions be strictly construed. *See* 5 U.S.C. § 552(c); *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 79 (1973). Yet there is no exception which permits withholding of documents because a request would not further the "core purpose" of the Act. *See, e.g., Ditlow* v. *Shultz*, 517 F.2d 166, 172 (D.C. Cir. 1975) ("We are doubtful that the public interest considerations can be limited to those at the core of the Act").



Moreover, while the government suggests that the "core purpose" of the Act is to "'open agency action to the light of public scrutiny'" *Department of Air Force* v. *Rose*, 425 U.S. at 372, this is not the uniformly recognized "core purpose" of the Act. *See, e.g., id.*, at 360-61 ("Congress therefore structured a revision whose basic purpose reflected 'a general philosophy of full agency disclosure'"); *Soucie* v. *David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971) ("Congress passed the [FOIA] in response to a persistent problem of legislators and citizens, the problem of obtaining information to evaluate federal programs and formulate wise policies").

Of course, it is somewhat simplistic to suggest that a statute that was ten years in the making had a sole "core purpose," and, indeed, it is easy to identify at least four competing purposes of the Act. *See* A. Kronman, "The Privacy Exemption to the Freedom of Information Act," 9 J. Legal Studies 727, 733-38 (1980). Significantly, however, the Senate Report states the purpose of the Act by quoting James Madison:

> A people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.

S. Rep. No. 813, *supra* at 2-3. Thus, if it can fairly be said that there is one "core purpose" of the FOIA, it must be simply to allow the public access to government information.

Judged against the Senate's conception of the "core purpose" of the Act, the government's test is meaningless. Since the purpose of the FOIA was to give the public access to government information, any request, so long as it sought government records, would serve the "core purpose" of the Act. Information which would not serve this core purpose would simply be information the government did not have, or, perhaps, information which for some other reason could be characterized as nongovernmental. No balancing is required, or even possible, in this formulation of the rule.

Even rejecting Congress' concept of what it was doing in enacting the FOIA and instead accepting the government's notion that the sole purpose of the Act was to allow citizens to oversee the inner workings of executive agencies, the use of a "core purpose" test to gauge Exemption 6 cases is still unworkable. The premise of the government's argument is, presumably, that the greater the privacy interest at stake, the more the release of the information must facilitate monitoring of federal activities. The fallacy of this premise is that there is nothing intrinsic in government records themselves (considered apart from the use to which they will be put) which would allow a court to determine to what extent their disclosure will facilitate monitoring of government activities.

Virtually any governmental information could be used to scrutinize some governmental function. For example, a request for release of the names and addresses of former National Security Agency employees could lead to information from which a book about the NSA could be written. Though less directly, a request for release of



names and addresses of all former federal employees could lead to this same objective.

Similarly, a request for names and addresses of all federal annuitants could facilitate the communication of information from a large segment of the population to Congress and thus "insure that Congress is apprised of the interests and needs of a significant segment of the public which its actions will affect." *Disabled Veterans*, 428 F. Supp. at 458. This information could also be used to make an analysis of whether the cost of living adjustments administered by the Office of Personnel Management are adequate (or excessive) because annuitants may live in areas with different inflation rates. Or this information could be used to assess whether the government timely, accurately and efficiently pays annuitants. Indeed, this information could be used to see if the government is using the retirement fund as Congress contemplated or is diverting monies to some unauthorized purpose.

Accordingly, use of a "core purpose" test adds nothing to the calculus of the public interest, although it does place a premium on the ingenuity (or perhaps disingenuousness) with which the parties can characterize the nature of the requested information. To prevail in an Exemption 6 case, the government would have to show that none of the conjectured uses of the information (no matter how unrelated to the actual purpose of the request) would facilitate monitoring of the operation of the government, or, failing that, that the total "core purposefulness" of the request does not outweigh the privacy interest at stake.

This Court should not impute to Congress an intent to ignore reality and to remit disclosure to a process that is based on a "balancing" that weighs in its scales whatever *post hac* declarations of purpose the parties or the court can contrive. Instead, it is much more congruent

with Congress' purpose to recognize that the *real* interests at stake are those that should be taken into account in deciding whether disclosure is required. The government's core purpose analysis leads to an approach based on fiction and contrivance. It should be rejected.

## CONCLUSION

The result the court of appeals reached is correct and should be affirmed. Its public interest analysis, and the government's "core purpose" test, are incorrect, however, and these rationales must be rejected.

Respectfully submitted,

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